86-71

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CTS CORPORATION,

Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT OF APPELLANT CTS CORPORATION

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QUESTIONS PRESENTED

1. Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), which makes the post-acquisition voting rights of "control shares" in covered Indiana corporations subject to a majority vote of all shareholders other than the acquiring entity and incumbent management, but does not regulate disclosures to shareholders or the purchase of shares, is unconstitutional under the Supremacy Clause because preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f), which regulates only disclosures to shareholders and the purchase of shares in tender offers.

2. Whether the Control Share Acquisitions Chapter, which does not discriminate against interstate commerce or out-of-State residents, applies only to Indiana corporations with other substantial ties to the State, and regulates shareholder voting rights as a matter of the State's generic corporation law governing the internal affairs of Indiana corporations, is unconstitutional under the Commerce Clause.

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OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit issued its final opinion on June 9, 1986. The opinion, which has not yet been published, is set forth in the separately-bound Appendix to Jurisdictional Statement of Appellant CTS Corporation ("Appendix") at A1. The two not-yet-published opinions of the United States District Court for the Northern District of Illinois on the questions presented were issued on April 9 and April 16, 1986, and are set forth in the Appendix at A29 and A88.

JURISDICTION

This is a civil action commenced in the United States District Court for the Northern District of Illinois by appellee Dynamics Corporation of America ("DCA") against appellant CTS Corporation ("CTS") and others.[1] DCA's complaint, as

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[1] *Rule 15.1(b) Listing:* In Seventh Circuit No. 86-1601, which involved the constitutional questions presented by this appeal to the Supreme Court, the parties in the Seventh Circuit were DCA, as plaintiff-appellee; CTS, Robert Hostetler, Gary Erekson, and Joseph DiGirolamo (officers and/or directors of CTS), as defendants-appellants; and the State of Indiana, as intervenor-appellant.

Seventh Circuit No. 86-1608 involved the same action in the District Court and was consolidated with No. 86-1601 for decision by the Seventh Circuit, but did not involve the constitutional questions presented by the present appeal. In No. 86-1608, the parties in the Seventh Circuit were DCA; Andrew Lozyniak, Edward J. Mooney, Henry V. Kensing, Patrick J. Dorme, Frank A. Gunter, Curtis T. Roff, Saul Sperber, Joseph P. Walker and Harold Cohan (officers and/or directors of DCA); CTS; and Robert D. Hostetler, Gary B. Erekson, Joseph DiGirolamo, George F. Sommer, Gerald H. Frieling, Jr., Don J. Kacek, Ted Ross and Richard M. Ringoen (officers and/or directors of CTS).

Rule 28.1 Listing. Appellant CTS Corporation has no parent corporation, non-wholly owned subsidiaries, or affiliates.

Rule 28.4(c) Statement: 28 U.S.C. § 2403(b) may be applicable to this appeal. The State of Indiana intervened as appellant in the

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amended, alleged violations of the Federal securities laws, pendent State-law claims, and that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), violates the Supremacy and Commerce Clauses of the Constitution of the United States. Federal jurisdiction was based upon 15 U.S.C. § 78aa, 28 U.S.C. §§ 1331 & 1332, and the doctrine of pendent jurisdiction. The constitutional claim is the only claim pertinent to this appeal.

The judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), entered April 23, 1986, held the State statute unconstitutional on both Supremacy and Commerce Clause grounds. Appendix at A126. On July 16, 1986, CTS filed in the Seventh Circuit its notice of appeal to this Court. Appendix at A133. The Supreme Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved, the texts of which are set forth in the Appendix at A140:

1. The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

2. The Supremacy Clause, U.S. CONST. art. VI, cl. 2

3. The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f).

4. The Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986).

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Seventh Circuit to defend the State statute. The State of Indiana then filed in the Seventh Circuit a separate Notice Of Appeal to this Court. Counsel for CTS is presently informed that the State will file a separate Jurisdictional Statement with this Court.

STATEMENT OF THE CASE

A. General Background.

Appellant CTS is an Indiana corporation with its principal place of business in Indiana. Appellee DCA is a New York corporation with its principal place of business in Connecticut. On March 10, 1986, DCA, then the beneficial owner of approximately 9.6% of the outstanding shares of CTS's single class of stock, announced a combination partial tender offer and proxy contest. DCA's tender offer sought one million shares of CTS stock, which would give it approximately 27.5% of the outstanding CTS shares. DCA's proxy contest sought to replace CTS's entire board of directors with a slate proposed by DCA at CTS's annual shareholders meeting then scheduled for April 25, 1986 (the "Annual Meeting").

On March 4, 1986, prior to DCA's announcement, the Governor of Indiana signed into law the new Indiana Business Corporation Law, IND. CODE ANN. §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), a comprehensive revision of the State's generic corporation code. Mandatory application of the new law to Indiana corporations begins August 1, 1987, but corporations may elect to be governed by it before that date. *See* IND. CODE ANN. § 23-1-17-3. On March 27, 1986, CTS elected to be covered by the new law effective April 2, 1986. The courts below held unconstitutional the Control Share Acquisitions Chapter of the new law, IND. CODE ANN. §§ 23-1-42-1 to -11 ("Control Share Chapter").

B. The Control Share Chapter.

The Control Share Chapter governs the voting power of "control shares" of certain Indiana corporations. It does not restrict or otherwise regulate the purchase or sale of such shares, whether in a tender offer or otherwise. "Control shares" are any shares that, when added to the acquiring person's previous holdings, pass any one of three thresholds — 20%, 33.3%, or 50% — of voting strength in electing the corporation's

board of directors. IND. CODE ANN. § 23-1-42-1. The Control Share Chapter applies only to an "issuing public corporation," defined as an Indiana corporation that has:

(1) 100 or more shareholders;

(2) its principal office, principal place of business, or substantial assets in Indiana; *and*

(3) either more than 10% of its shares owned by Indiana residents, or more than 10% of its shareholders resident in Indiana, or more than 10,000 shareholders resident in Indiana.

See IND. CODE ANN. § 23-1-42-4(a).[2]

Substantively, the Control Share Chapter provides that "[c]ontrol shares have the same voting rights as were allocated the shares before the control share acquisition only to the extent granted by resolution approved by the shareholders of the issuing public corporation." IND. CODE ANN. § 23-1-42-9(a). Since the one million shares sought (and later purchased) by DCA pursuant to its tender offer put DCA over the 20% threshold, the voting power of those "control shares" must be determined by a shareholder vote that excludes "all interested shares" — *i.e.*, shares owned by officers of the corporation, directors who are also employees of the corporation, and the acquiring person. IND. CODE ANN. §§ 23-1-42-9(b)(2) (shareholder vote) & -42-3 (defining "interested shares"). Thus, under the Chapter, DCA may not vote its newly-acquired

[2] The term "corporation" as used in the Control Share Chapter is defined for purposes of the entire Business Corporation Law as "a corporation for profit that is not a foreign corporation." IND. CODE ANN. § 23-1-20-5. The District Court had erroneously concluded that the Control Share Chapter could be applied to foreign corporations. The Seventh Circuit corrected this error and held, as the plain language provides, that the Chapter applies only to Indiana corporations.

shares until it receives a majority vote of approval by the remaining CTS shareholders who are affiliated with neither CTS management nor DCA.[3]

The Control Share Chapter creates a mechanism for a prompt vote by the disinterested shareholders on the voting rights of the control shares. At any time before, during, or after its acquisition of control shares, the acquiring person may file an "acquiring person statement" with the company. IND. CODE ANN. § 23-1-42-6. Upon request of the acquiring person, a special shareholders meeting to decide the voting rights of the control shares must be held no later than fifty days after the company receives the statement. IND. CODE ANN. § 23-1-42-7. If no special meeting is requested, the issue will be decided at the next special or annual shareholders meeting. IND. CODE ANN. § 23-1-42-7(c). In this case, DCA neither filed a statement nor requested a special meeting.

The Control Share Chapter applies to all control share acquisitions of the stock of covered Indiana corporations, regardless of the State of residency of the acquiring person. Similarly, the statute applies regardless whether the shares are acquired (a) in intrastate or interstate commerce, or (b) through a tender offer, open market or private purchases, gift, inheritance, or otherwise.

[3] The District Court and the Seventh Circuit mistakenly thought that IND. CODE ANN. § 23-1-42-9(b)(1) required DCA also to obtain approval by a majority of *all* CTS shares, including "interested shares." Section 9(b)(1) applies only where the proposed acquisition would effect certain changes in the capital structure of the company, such as changing the number of shares of stock, creating a new class of shares, or altering the rights of a class of shares. *See* IND. CODE ANN. § 23-1-38-4(a). The State of Indiana, as intervenor-appellant, brought the district court's error to the Seventh Circuit's attention, but the Court of Appeals repeated the error without explanation.

C. Proceedings In The Courts Below.

On March 10, 1986, DCA filed this action in the District Court, originally against CTS and three of its directors, alleging claims unrelated to this appeal.[4] On April 3, DCA was granted leave to file a third amended complaint adding as Count VIII a claim alleging that the Control Share Chapter is unconstitutional under (a) the Supremacy Clause because allegedly preempted by the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) ("Williams Act"); and (b) the Commerce Clause. On April 9, 1986, the District Court issued a Memorandum Opinion and Order "grant[ing] DCA's motion for declaratory relief on Count VIII of the third amended complaint" and ruling that the Control Share Chapter, as applied to DCA's specific plans, was preempted by the Williams Act. Appendix at A29.[5] After CTS moved the District Court to certify its judgment on Count VIII as a final and appealable judgment pursuant to FED. R. CIV. P. 54(b), the District Court *sua sponte* issued a second Memorandum Opinion and Order on April 16, 1986, which (a) stated that, if the Indiana Attorney General had been notified of the constitutional issues pursuant to 28 U.S.C. § 2403(b), the

[4] DCA's original complaint alleged an "illegal proxy scheme" in violation of the Federal securities laws, claiming that CTS's communications to its shareholders were "designed" to "jump the gun" on the April 25, 1986, shareholders' meeting and "to condition the CTS shareholders" to vote to retain the present board of directors. Through March 27, DCA filed two amended complaints alleging additional claims and adding director defendants; CTS filed an answer and counterclaim; and the District Court denied DCA's motion for a temporary restraining order on its original claim. These matters are not involved in the instant appeal.

[5] As well as opposing DCA's constitutional claims on the merits, CTS had objected to any immediate decision on the constitutional issues because, *inter alia*, the Attorney General of Indiana had not been notified of the claim as required by 28 U.S.C. § 2403(b); no opportunity for an evidentiary hearing had been afforded; and CTS's time to answer the third amended complaint had not even run.

District Court would also have held the State statute unconstitutional under the Commerce Clause; (b) certified the court's judgment on Count VIII pursuant to Rule 54(b); and (c) "certified the appeal" of the judgment on Count VIII to the Indiana Attorney General. Appendix at A88.

CTS's appeal to the Seventh Circuit pursuant to 28 U.S.C. § 1291[6] was expedited in view of the imminent Annual Meeting. On April 23, 1986, the Seventh Circuit issued both its judgment affirming the District Court and an order briefly describing its action, stating that a full opinion would issue later. Appendix at A126, A129. On June 9, 1986, the Seventh Circuit issued its final opinion, holding, *inter alia*, that the Indiana Control Share Chapter is unconstitutional both on Supremacy Clause grounds (broader than those recited by the District Court) and under the Commerce Clause.[7]

[6] The Seventh Circuit's opinion, like its original order, erroneously states that the appeal in No. 86-1601 was taken pursuant to 28 U.S.C. § 1292(a)(1) (appeal of grant or denial of preliminary injunction). Appendix at A2, A130. On April 17, 1986, the day following its second opinion on the constitutional claim and Rule 54(b) certification of its judgment on Count VIII, the District Court had entered a preliminary injunction against CTS on DCA's separate State law claim involving a shareholder rights plan promulgated by the CTS board of directors, and denied CTS's motion for a preliminary injunction against DCA based on alleged Federal securities law violations. CTS then separately appealed those District Court rulings in No. 86-1608, and the two appeals were consolidated by the Seventh Circuit. The appeal of the District Court's orders on the preliminary injunction motions (involving issues not presented to this Court) was pursuant to 28 U.S.C. § 1292(a)(1); however, the appeal of the constitutional issues presented here was from the District Court's final judgment on Count VIII, Appendix at A138, and therefore pursuant to 28 U.S.C. § 1291.

[7] The following matters, while not appearing in the appellate record before the Seventh Circuit in the instant appeal, have transpired since the Seventh Circuit's judgment:

(1) On April 24, 1986, DCA purchased one million shares of CTS stock pursuant to its tender offer and now owns approxi-

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THE QUESTIONS ARE SUBSTANTIAL

Though this case arises amid a continuing policy debate about the economic, political, and social effects of hostile takeovers,[8] resolving that debate is not what this case is about. Nor is the issue the extent to which the States have continuing authority to regulate the purchase and sale of shares — the subject matter of the Williams Act. Rather, the heart of this case is whether Federal law bars the States from developing their generic corporation laws in ways that do *not* restrict or regulate the purchase or sale of securities or any other transaction in interstate commerce, but that may (depending on the intentions of a potential bidder) make a State's domestic corporations less attractive as hostile takeover targets.

The Seventh Circuit's decision strikes down on Supremacy and Commerce Clause grounds an Indiana statute that regu-

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mately 27.5% of its outstanding stock, thereby triggering the terms of the Control Share Chapter.

(2) The CTS Annual Meeting was rescheduled and held on May 16, 1986. All of DCA's shares were voted at the meeting, in violation of the Indiana statute but as required by the Seventh Circuit's decision. Nevertheless, DCA's proxy contest was unsuccessful and CTS's incumbent board of directors was re-elected as determined by the count of an independent auditor. DCA has filed new claims, now pending in the District Court, seeking to overturn the results of the election.

(3) DCA's motion for a preliminary injunction against enforcement of a second shareholders' rights plan promulgated by the CTS board was denied by the District Court, and DCA's appeal on that issue is now pending before the Seventh Circuit.

The continuing litigation in the lower courts does not involve the constitutional issues presented by this appeal and could not moot the continuing controversy over DCA's legal authority to vote its recently-acquired shares for all future purposes.

[8] *Compare, e.g.*, Bebchuck, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693 (1985), *with* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

lates *only* the voting rights of shareholders. The statute applies to *all* changes in control of covered Indiana corporations, regardless whether the control shares are acquired in interstate or intrastate commerce, and regardless whether the acquisition is made through a tender offer, open market or private purchases, gift, or any other means. The Indiana statute is *not* an anti-takeover statute directed to the subjects regulated by the Federal securities laws. It does not prohibit or regulate the purchase of shares; nor does it discriminate against interstate commerce or out-of-State residents. Nonetheless, the Seventh Circuit reasoned, in essence, that the statute is unconstitutional simply because it may make Indiana corporations less desirable as takeover targets.

In recent years, this Court has twice noted probable jurisdiction of appeals in cases striking down traditional State anti-takeover statutes on Supremacy and Commerce Clause grounds. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *LeRoy v. Great Western United Corp.*, 443 U.S. 173 (1979). *LeRoy* was decided on venue grounds without reaching the constitutional issues. *MITE* reached but did not definitively resolve the issues. Four Justices (one of whom, Justice Powell, also thought the case was moot) joined in one half of Justice White's Commerce Clause opinion. Two Justices joined Justice White's preemption analysis, two others disagreed, and four did not address the issue. Justices Powell and Stevens concurred in the judgment but stated that the decision left room for State legislation that might deter hostile takeovers.

Not surprisingly, decisions in the lower courts after *MITE* reflect considerable uncertainty about the constitutional principles applicable even to State statutes that — unlike the Indiana statute here — *do* regulate tender offers and the purchase of shares. For example, in *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982), the Eighth Circuit treated as controlling both the Supremacy and Commerce Clause portions of Justice White's opinion in *MITE*, and invalidated a Missouri statute regulating disclosures by a tender

offeror. However, in *Cardiff Acquisitions, Inc. v. Hatch,* 751 F.2d 906, 913 (8th Cir. 1984), the same court noted the divisions in *MITE* — stating that "the [Supreme] Court has not definitively resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger and Blackmun, or some other analysis should apply" — and upheld a Minnesota statute regulating disclosures by a tender offeror. Similarly, in *Agency Rent-A-Car, Inc. v. Connolly,* 686 F.2d 1029, 1034, 1036 (1st Cir. 1982), the First Circuit described the divided opinions in *MITE,* upheld Massachusetts' regulation of "creeping" tender offers against a Supremacy Clause challenge, and rejected the notion that *MITE* stands for a "broad preemption principle under which any state regulation of tender offers would have to be invalidated."

In *L.P. Acquisition Co. v. Tyson,* 772 F.2d 201 (6th Cir. 1985), the Sixth Circuit took a different approach in holding that *MITE* did not invalidate the Michigan Takeover Act. The court relied on Justice Powell's concurrence — specifically, his statement that Justice White's Commerce Clause reasoning "leaves some room for state regulation of tender offers," and his observations about the "adverse consequences in terms of general public interest when corporate headquarters are moved from a city and state." 772 F.2d at 201 (quoting 457 U.S. at 646). Yet the same court had earlier held the same Michigan act to be unconstitutional as applied to an interstate tender offer in *Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d 558, 567-68 (6th Cir. 1982).[9]

Thus, even if this case were only *MITE* revisited, it would deserve plenary consideration to resolve the open issues and

[9] *See also Fleet Aerospace Corp. v. Holderman,* FED. SEC. L. REP. (CCH) ¶ 92, 800 (6th Cir. June 25, 1986) (extending Justice White's opinion in *MITE* to invalidate State law subjecting control share *purchases,* not voting rights, to shareholder approval); *Icahn v. Blunt,* 612 F.Supp. 1400, 1414-20 (W.D. Mo. 1985) (same); *APL Limited Partnership v. Van Dusen Air, Inc.,* 622 F. Supp. 1216, 1220-24 (D. Minn. 1985) (same), *vacated on other grounds and appeal dismissed,* Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985).

guide the lower courts. In this case, however, the Seventh Circuit extended Justice White's opinion to strike down a statute radically different from the Illinois statute in *MITE.* The Seventh Circuit's invalidation of a statute that does not regulate disclosures to shareholders or the purchase of shares in tender offers is unprecedented and has no logical stopping point. Under its reasoning, every aspect of every State's corporation law — including the composition and election of boards of directors, voting rights of different classes of shares, and requirements of shareholder approval of fundamental corporate events such as mergers, sales of assets, or dissolutions — is subject to constitutional challenge. Any such law may "interfere" with tender offers, in the sense relied upon by the Seventh Circuit, simply by making a corporation a less desirable target than it might be under some alternative set of legal rules.

The Seventh Circuit thus decided important and far-reaching questions of constitutional law in an area where this Court's earlier decisions offer little direct guidance, let alone controlling precedent. Moreover, the nature of tender offer litigation requires the lower courts to decide important constitutional issues under extreme time pressure, as occurred here, and such cases frequently become moot long before this Court can review them. This case therefore deserves plenary consideration both to resolve the issues left unresolved by *MITE* and to decide whether *MITE* extends to invalidate any State corporation law that might adversely affect a hostile takeover.

I. THE CONTROL SHARE CHAPTER DOES NOT CONFLICT WITH THE WILLIAMS ACT IN VIOLATION OF THE SUPREMACY CLAUSE.

The Seventh Circuit's opinion on Williams Act preemption rests on two essential premises. The first is that the Williams Act implicitly requires the States to maintain a policy of "neutrality" in tender offers, and thus preempts State statutes that do not actually conflict with Federal statutory provisions

but may nonetheless "favor" one side or the other in the contest. That proposition was accepted by three Justices in *MITE*, rejected by two others, and not addressed by the remaining four. The second premise is that this policy of "neutrality" extends beyond the scope of matters regulated by the Williams Act itself — disclosures to shareholders and the purchase and sale of shares — to other State corporation laws that may affect the desirability of a tender offer. The decision of the Seventh Circuit thus "Federalizes" State corporation law to the extent that any State law may, by some uncertain standard, "unduly" affect the desirability or outcome of either a tender offer itself or a tender offeror's post-acquisition plans for the target. Neither Justice White in *MITE* nor any lower court decision, before this one, has gone so far in extending Federal law into the internal affairs of corporations created by the States' own laws.

A. The Control Share Chapter is Entitled to a Strong Presumption of Constitutionality.

The ordinary presumption of constitutionality given to State laws is strongest in the preemption context. To preserve the States' lawmaking authority, the starting assumption is "that Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and preemption is disfavored "in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

Because the Control Share Chapter deals only with the post-acquisition voting rights of shares in a potentially fundamental event for the corporation and its other shareholders — a change in control — the presumption against preemption is especially strong. "Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded

by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Here, the Seventh Circuit held preempted a law directly governing the internal affairs of corporations and the voting rights of shareholders — historically matters of *exclusive* State concern.

B. The Provisions of the Williams Act Do Not Preempt State Law in the Absence of a Direct Conflict With Federal Law.

The Williams Act added to the Securities Exchange Act of 1934 ("Exchange Act") sections 13(d), 13(e), 14(d), 14(e), and 14(f). The Williams Act governs disclosures and statements in connection with offers to purchase shares, Exchange Act §§ 13(d), 14(d), 14(e) & 14(f); requires or prohibits certain acts so that investors will have sufficient time to decide whether to tender their shares, *id.* §§ 13(e) & 14(d); and imposes substantive requirements on tender offerors' purchases of shares, *id.* § 14(d).

None of these statutory provisions expresses *any* limit on State authority. Instead, all are subject to Section 28(a) of the Exchange Act, which states that the Act does not preempt State law that does not actually "conflict with" the "provisions" — not the *policy* — of the Exchange Act. 15 U.S.C. § 78bb(a). Thus the only *statutory* expression of Congressional intent is that the Williams Act is not intended to displace State regulation of tender offers in the absence of a *direct* conflict.

C. The Legislative History of the Williams Act Does Not Support Preemption of State Laws That May Impede Takeovers.

The Seventh Circuit did not base its preemption holding on any direct conflict.[10] Rather, it concluded from only the legisla-

[10] The closest the Seventh Circuit came to identifying a "conflict" was its claim that, because the disinterested shareholder vote on the

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tive history of the Williams Act that Congress had "struck a delicate balance between the contending factions in the takeover controversy," and had implicitly prohibited the States from taking any steps that might tip that balance. Appendix at A23.

This Court's decision in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26-35 (1977), explained the context of the Congressional "balance" — a context the Seventh Circuit ignored. As the *Piper* Court observed, the bill as first introduced was intended to protect incumbent corporate management from cash tender offers, a strategy that had not previously been regulated by Federal securities laws. In committee hearings, however, witnesses "indicated that takeover bids could often serve a useful function." *Id.* at 30. Sensitive to the suggestion that the bill would favor one side or the other in control contests, the Williams Act sponsors "made it clear that the legislation was designed solely to get needed information to the investor," *id.* at 30-31, and that they had "taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid." *Id.* at 31

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voting power of control shares might not take place until 50 days after filing of an optional acquiring person statement, *see* IND. CODE ANN. § 23-1-42-7(b), a tender offeror would in practice wait beyond the 20 business day (*circa* 28 calendar day) *minimum* Williams Act waiting period before purchasing shares — which the Seventh Circuit characterized as "impos[ing] a 50-day delay on tender offers." Appendix at A20. The characterization is inaccurate. There is in fact no legally cognizable "conflict," since the shareholder vote under the Indiana law has *no* impact whatever on the acquirer's legal right to buy shares in a tender offer. *See infra* at 17-18. By speculating about the statute's possible impact on a tender offeror's practical calculations, the lower court substituted economic theorizing for the proper focus of judicial inquiry under the Supremacy and Commerce Clauses — namely, whether the States (whatever the possible *economic* impact of their decisions) have the constitutional *authority* to regulate in a given area. *See infra* at 25-28.

(quoting 113 Cong. Rec. 24664 (1967) (remarks of Sen. Williams)).

Placed in context, the isolated references to neutrality on the part of *Congress* do not support the Seventh Circuit's conclusion (and Justice White's in *MITE*) that the Williams Act also implicitly barred the *States* from affecting the "balance of power" between the tender offeror and the target:

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in the section of the Senate Report entitled, "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[s] in a form of industrial warfare." The Senate Report expressed the purpose as "plac[ing] investors on an equal footing with the takeover bidder," Senate Report 4, without favoring either the tender offeror or existing management.

430 U.S. at 29-30. Thus, the references to "neutrality" suggest only that Congress *itself* did not wish to "tip the balance" with the Williams Act, not that Congress implicitly intended the Act to be a comprehensive scheme regulating tender offers to the exclusion of State authority.

The Seventh Circuit acknowledged that "it is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations." Appendix at A22. Nonetheless, it relied on Justice White's and its own opinions in *MITE* and on subsequent lower court decisions to justify that "big leap," saying that "whatever doubts . . . we might entertain as an original matter are stilled by the weight of precedent." Appendix at A23. The "weight of precedent" is not at all persuasive here, however, because a majority of this Court has

never accepted the proposition that the Williams Act forbids States from adopting any laws more hostile to takeovers. Indeed, Justices Powell and Stevens both rejected the suggestion that Congressional neutrality was tantamount to Federal prohibition of more restrictive State laws. 457 U.S. at 647, 655.

The Seventh Circuit's reliance on *Piper* and *Schreiber v. Burlington Northern, Inc.*, 472 U.S. ____, 105 S. Ct. 2458, 2463, 86 L. Ed. 2d 1 (1985), is clearly misplaced. In *Piper*, this Court expressly *rejected* the argument that the Williams Act created a "pervasive scheme of federal regulation of tender offers" that would support an implied cause of action (or, necessarily, preemption of State law). 430 U.S. at 29. In *Schreiber*, this Court *refused* to extend the Williams Act to regulate the defensive strategies of the target board of directors, leaving such matters to State corporation law. There was no suggestion in *Schreiber* that the State corporation law governing defensive strategies must also display an appropriate "neutrality" lest it encroach upon the Williams Act; yet that result is logically compelled by the Seventh Circuit's decision.

D. Any Preemption Under the "Neutrality Principle" is Limited to the Subject Matter of the Williams Act and Does Not Preempt State Corporation Laws Protecting Remaining Shareholders Caught in Fundamental Changes in the Corporation.

Even assuming that the "neutrality" statements in the legislative history can preempt otherwise valid State laws, it still does not follow — as the Seventh Circuit effectively held — that *any* State laws making tender offers less attractive to the offeror are preempted. Rather, the scope of any preemption arising from this legislative history must be limited by the subject matter of the Williams Act.

This Court's cases have necessarily limited preemption to those matters *actually regulated* by Federal statutes, not to any State law that might touch on the area. In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445-46 (1966), for

example, the Court concluded that Federal laws for inspection of steamship boilers did not preempt local air pollution regulations even though the local laws prohibited conduct allowed by Federal law. Because there was "no overlap" between the Federal and local laws, there was no preemption. "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U.S. at 446. *Accord, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 237 (1947).

The Williams Act and its legislative history address only a narrow subject — the interactions among tender offerors, incumbent management, and investors up to the point when the investor makes an "informed choice" whether to tender his shares. As Justice White said in *MITE*, "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." 457 U.S. at 634. The Control Share Chapter regulates only post-acquisition voting rights and addresses entirely different concerns, namely, protecting the interests of other shareholders (*e.g.*, in a tender offer, those who choose *not* to tender their shares) vis-a-vis a new and potentially dominant one. The Chapter is thus beyond the scope of whatever preemption might be mandated by the supposed "neutrality principle."

The Indiana legislature had legitimate reasons to be concerned with the situation where one shareholder acquires a dominant portion of voting shares. There is an inherent possibility of unfair treatment when a dominant (but not 100 percent) shareholder maintains the controlled corporation as a partly-owned subsidiary for some unspecified time. *See* Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1711 (1985) (dominant shareholder adopts such a strategy only to take

"advantage of minority shareholders"). The Indiana Control Share Chapter allows dispersed shareholders in a firm with a new and potentially dominant shareholder to protect their interests by voting.

In so doing, the Chapter reflects a valid legislative concern for shareholder control over a fundamental event in the corporation's existence — the transformation of the corporation from a collection of dispersed shareholders to one dominated by a single shareholder. If there is no shareholder vote and the dominant shareholder gains control of the board, the large group of remaining shareholders, "without its consent, is participating in a different enterprise as certainly as if there had been a merger with a third party." Brudney, *Equal Treatment of Shareholders,* 71 CAL. L. REV. 1072, 1122 (1983). In this respect, the Control Share Chapter is squarely in the tradition of State corporation laws requiring shareholder votes on other fundamental corporate events such as mergers, sales of assets, changes in voting power of classes of shares, or dissolutions.

But whatever the substantive merits of the policy decisions reflected in the Control Share Chapter, those decisions were Indiana's to make. In view of the narrow subjects regulated by the Williams Act, there is no basis for concluding that *Congress* has made a policy judgment to bar innovative State statutes governing the voting power of shares in State-created corporations. Congress has instead traditionally left regulation of these internal corporate affairs to the State of incorporation. *Cort v. Ash,* 422 U.S. 66, 84 (1975). Indeed, the established validity of State authority to govern the internal affairs of corporations has led this Court to construe the Exchange Act narrowly so as *not* to "federalize . . . the law of corporations." *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479 (1977). *Accord, Schreiber v. Burlington Northern, Inc.,* 472 U.S. ____, 105 S. Ct. 2458, 86 L. Ed. 2d 1 (1985) (§ 14(e) does not apply

to alleged breaches of fiduciary duty by incumbent board of directors in tender offer context).[11]

The decision below violates that principle, and its necessary implications highlight the need for review by this Court. The list of State laws that could be preempted under the Seventh Circuit's analysis is remarkably long. The Model Business Corporation Act — followed by many States — has long authorized directors to determine the relative voting rights of classes and series of shares, which can obviously be used to discourage a tender offer. *See* MODEL BUS. CORP. ACT § 16 (1969); REV. MODEL BUS. CORP. ACT §§ 6.01(c), 6.02(1984). Statutes requiring shareholder votes on fundamental corporate events — *e.g.,* mergers, IND. CODE. ANN. § 23-1-40-3, sales of of assets, IND. CODE ANN. § 23-1-41-2, and dissolutions, IND. CODE ANN. § 23-1-45-1 — could certainly interfere with a tender offeror's desired takeover scheme and thus be preempted. State laws governing the timing of shareholder meetings, *e.g.,* IND. CODE ANN. §§ 23-1-29-1 *et seq.,* or the election of directors, *e.g.,* IND. CODE ANN. §§ 23-1-33-1 *et seq.,* may affect a tender offeror's ability to take control of a target corporation and thus also become constitutionally suspect.

Even assuming, then, that the "neutrality" observations in the legislative history have preemptive force, that force is limited to the subjects actually regulated by the Williams Act. That subject matter at least provides a baseline by which courts may determine whether State statutes are "neutral" or not. But outside that limited context, the "neutrality" observations do not give the Federal courts a roving mandate to adjudicate the

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[11] Indeed, in 1984 Congress rejected proposed legislation that would have restricted defensive tactics in takeover contests, H.R. 5693, 98th Cong., 2d Sess. (Comm. Print 1984), in part because the bill would have intruded on State corporation law. *See Annual Review of Federal Securities Regulation,* 40 BUS. LAW. 997, 1019-21 (1985). *See also* H.R. Rep. No. 1028, 98th Cong., 2d Sess. 9-17 (1984) (noting that *Congress* must address proper relationship between State and Federal law in regulating takeovers).

"neutrality" of all State corporation laws that may affect the desirability of tender offers.

II. THE CONTROL SHARE CHAPTER DOES NOT VIOLATE THE COMMERCE CLAUSE.

The Control Share Chapter does not discriminate in any way against interstate commerce or out-of-State residents, and it applies only to Indiana corporations that also have other substantial ties to the State. Nor does the statute prohibit or regulate purchases of shares, whether in interstate commerce or otherwise. Instead, it regulates only the post-acquisition voting rights of control shares, however acquired. By holding that the Control Share Chapter violates the Commerce Clause, the Seventh Circuit extended the reach of the "dormant" Commerce Clause too far into the States' traditional regulation of the internal affairs of the corporations they create.

The Chapter serves the legitimate State purpose of protecting the interests of remaining shareholders who may be adversely affected by a change in control of the corporation. Any indirect effects of the Chapter on interstate commerce are minor, especially since State law exclusively creates and defines the stock rights that are available for purchase in the first place. The Commerce Clause does *not* require State law to *define* shareholders' rights (or any other property rights) in any specific way, so long as the State does not discriminate against interstate commerce. The Seventh Circuit's holding to the contrary is unprecedented in Commerce Clause jurisprudence.

A. The Control Share Chapter Does Not Directly Regulate or Discriminate Against Interestate Commerce.

The first critical feature of the Control Share Chapter is that it neither regulates nor discriminates against interstate commerce. The State's regulation of the voting rights of control shares applies whether the control shares are acquired in intrastate or interstate commerce, and whether through a tender offer, private or open market purchases, inheritance, or otherwise. Likewise, it applies regardless of the residences of the buyer and seller.

The Chapter therefore easily passes the most basic of Commerce Clause tests. This Court accords "special deference" to State laws that do not discriminate against interstate commerce, based on the sound assumption that where the law's "burden usually falls on local economic interests as well as other States' economic interests, [this ensures] that a State's own political processes will serve as a check against unduly burdensome regulations." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981) (plurality opinion).[12] *Accord, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26 (1978) (no discrimination even where burden fell only on out-of-State businesses); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) (no discrimination).

B. The Control Share Chapter Applies Only to Indiana Corporations And Poses No Risk Of Multiple Burdens.

The second critical feature of the Control Share Chapter for Commerce Clause purposes is that it applies only to Indiana corporations with additional ties to the State.[13] Therefore, in addition to being nondiscriminatory, it poses no risk of subjecting the corporation or a tender offeror to cumulative, multiple and inconsistent State regulations—the other major concern in Commerce Clause jurisprudence. In *MITE*, for example, the

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[12] The plurality in *Kassel* concluded that this traditional deference was weakened where the State also created several exemptions that clearly reduced the burden of the regulations on its own residents. 450 U.S. at 676-78. The Indiana Control Share Chapter contains no such discriminatory exemptions.

[13] The corporation must also have (a) its principal place of business, its principal office, or substantial assets in the State, and (b) either 10% of its shareholders in Indiana, 10% of its shares owned by Indiana residents, or 10,000 shareholders in Indiana. IND. CODE ANN. § 23-1-42-4(a).

Illinois statute, which prohibited stock purchases and sales in a tender offer, was not so limited, and Justice White's opinion noted that "if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." 457 U.S. at 642. *Huron Cement* made the same point: "State regulation, based on the police power, which does not discriminate against interstate commerce *or operate to disrupt its required uniformity,* may constitutionally stand." 362 U.S. at 448 (emphasis added). In this case there is obviously no need for national uniformity in shareholder voting rights (unlike, for example, railroad or trucking regulation), and no risk of overlapping and inconsistent State regulation.

The absence of both discrimination against interstate commerce and any risk of overlapping and inconsistent State regulations should dispose of the Commerce Clause issue here. *See Huron Cement,* 362 U.S. at 448. Despite various formulations of the test, this Court has *never* struck down on Commerce Clause grounds State legislation that did not exhibit at least one of these features.

C. The Control Share Chapter Serves Legitimate State Interests in Protecting Non-Dominant Shareholders in Indiana Corporations.

In *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), this Court articulated a balancing test for "evenhanded" regulations "affecting" interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Assuming *arguendo* that (even absent discrimination or threat of multiple burdens) the *Pike* test applies here at all, the balance of interests is heavily in favor of the State statute.

The Control Share Chapter protects non-dominant shareholders in Indiana corporations whose interests could be adversely affected by a change in control of the corporation. By permitting these shareholders to decide whether voting control of the corporation should change hands through acquisition of the control shares by a single dominant person, the Chapter serves the legitimate State purpose of protecting their interests and promoting shareholder control over fundamental changes in the corporation. As discussed at greater length earlier in addressing the Supremacy Clause issue, minority or dispersed shareholders are vulnerable to exploitation by a dominant shareholder.

Indiana, like its sister States, has commonly required shareholder approval of fundamental changes in corporate affairs, and the new Indiana Business Corporation Law continues that practice. *See, e.g.,* IND. CODE ANN. §§ 23-1-38-3 (amendments to articles of incorporation); 23-1-40-3 (mergers and share exchanges); 23-1-41-2 (disposition of substantial assets); and 23-1-45-2 (dissolution). The Control Share Chapter's requirement of a disinterested shareholder vote reflects the Indiana legislature's conclusion that a single dominant shareholder's acquisition of a substantial block of shares is also a fundamental change for the corporation and should also be subject to shareholder approval. The legislature's judgment should not be second-guessed by the courts when the statute neither discriminates against interstate commerce nor regulates an interstate purchase in the first place.

The Seventh Circuit dismissed Indiana's interests as "trivial or even negative" by saying that "Indiana has no interest in protecting residents of Connecticut from being stampeded to tender their shares to Dynamics at $43." Appendix at A25 (citing *MITE*). That analysis ignores both the far different context of *MITE* and the State's real interests in the case at bar. The statute at issue here is *not* designed to protect shareholders — whether Indiana residents or not — in deciding whether to *sell* their shares, and it has utterly no effect on their ability to do so. Rather, the Control Share Chapter is intended to protect

shareholders — both resident and nonresident — of Indiana corporations who decide *not* to tender or otherwise dispose of their shares.

The Seventh Circuit's reasoning also misreads Justice White's opinion in *MITE*, apparently relying on the following passage:

> While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

457 U.S. at 644. That statement in *MITE* dealt with a statute that was *not* limited to Illinois corporations and that *did* regulate purchases and sales of shares between out-of-State sellers and buyers. Indiana, however, has a legitimate interest in protecting *all* shareholders of *Indiana* corporations in their relationships *inter sese*. The State is entitled to take steps to protect the investments of nonresidents as well as residents. That is a legitimate interest that necessarily inheres, in one form or another, in every State's corporation code.[14]

D. Any "Effects" of the Control Share Chapter on Interstate Commerce Do Not Burden Such Commerce and Do Not Rise to Constitutional Significance.

Assuming that the *Pike* balancing test even applies here, the Control Share Chapter could violate the Commerce Clause only if it imposed a burden on interstate commerce that is "clearly excessive" in relation to the State's interest in protecting non-dominant shareholders. The Seventh Circuit recognized that the Control Share Chapter does not impede interstate commerce in equity securities. The heart of its Commerce

[14] Indeed, if Indiana law *discriminated* between voting rights of resident and nonresident shareholders, it would create (rather than avoid) constitutional problems. *See Supreme Court of New Hampshire v. Piper*, 84 L. Ed. 2d 205, 210-11 (1985); *Toomer v. Witsell*, 334 U.S. 385, 396 (1945).

Clause analysis was its judgment (based on *no* evidence) that the Chapter impedes "commerce in corporate control" that the Seventh Circuit deemed "important." Appendix at A26. The Seventh Circuit reasoned that the efficiency with which a corporation's assets are employed "depends on the market for corporate control — an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." *Id.* Of course, this *ipse dixit* is simply wrong. Nothing in the Commerce Clause requires the States to create corporations at all, much less — as the Seventh Circuit held — to define the rights of shareholders so as to tie the voting rights of a share inextricably to an equity interest in the corporation's profits and property.

The Seventh Circuit made two fundamental errors. First, Judge Posner's opinion mistakenly equates economic efficiency with constitutionality. This Court's decision in *Exxon* makes clear that a State may impose "inefficient" regulations on commerce in order to further other goals, such as fairness to all shareholders. In *Exxon*, the fact that a State law altered "the natural functioning of the interstate market" was unimportant because the Commerce Clause does not protect "the particular structure or methods of operation" in a market. 437 U.S. at 127. Maryland was entitled to protect independent service station operators, even if that was not "efficient." The Seventh Circuit's concern about the efficient use of corporate assets here — like the plaintiffs' argument in *Exxon* — "relates to the wisdom of the statute, not to its burden on commerce." 437 U.S. at 128. The efficiency argument should therefore be addressed by the Indiana legislature, not the Federal courts.

Equally important, Judge Posner's reasoning fails to realize that the "market for corporate control" is a market *created only by State law defining property rights and ownership interests.* The market exists only because Indiana and other States have enacted laws that create corporations in the first place, and then permit them to issue equity securities that may then in turn be bought and sold. As Chief Justice Marshall explained long ago:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). State law defines the terms of the contract among the corporation, its shareholders and the State, and thereby (as is true of all State-created property interests) defines any interest that is available for sale, whether in interstate commerce or otherwise.

There is no basis for the Seventh Circuit's holding that the Commerce Clause requires Indiana to link voting rights inseparably to an equity interest in a company. The State may, in exchange for the privileges of the corporate franchise, impose conditions on those privileges, including limits on the transfer of voting power, which do not discriminate against interstate commerce. The fact that DCA made its purchases in interstate commerce adds nothing to its claim. "A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.). Thus, the fact that DCA's stock purchases were across State lines here — like the fact that interstate businesses were required to divest property in *Exxon* — is irrelevant for Commerce Clause analysis. 437 U.S. at 125.

While there may currently exist, as a practical matter, a familiar interstate market in corporate control, Indiana has simply chosen to give shareholders of its domestic corporations new rights vis-a-vis potentially dominant new shareholders. The Seventh Circuit found this unsettling, but it overlooked that:

> A Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic

> relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). This Court's decision in *Exxon* makes clear that the Commerce Clause does not require the States to establish economically "efficient" markets, even where interstate commerce is in some sense "affected." However familiar such markets may be, the Commerce Clause does not protect their "particular structure or methods of operation." 437 U.S. at 127. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 25 (Supp. 1979) (discussing *Exxon*); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").[15]

The Seventh Circuit's disregard of these fundamental principles of Federalism — and its substitution of economic analysis for Commerce Clause jurisprudence — are highlighted by its twin statements that the fact "that the mode of [State] regulation involves jiggering with voting rights cannot take it outside the scope of [Federal] judicial review," and that any other conclusion would invite "facile evasions" of the Commerce Clause. Appendix at A27. Both statements are wrong. The Commerce Clause (like the Constitution generally) is precisely concerned with which "modes" of regulation are the

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[15] Moreover, any risks posed by the Control Share Chapter are risks for Indiana itself, its domestic corporations, and their shareholders — not to the Nation. If the Seventh Circuit's economic analysis were correct, one might reasonably expect the Control Share Chapter to drive down the market price for shares in Indiana corporations. If that should occur — and whether it would is highly debatable — it would raise no Commerce Clause issue. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978).

province of the Federal Government and which are the province of the States. The proper focus of constitutional inquiry is where the Constitution places the power to act — an inquiry that does not turn on whether regulation will yield a given economic result in a particular case. *Cf. Synar v. United States*, 626 F. Supp. 1374, 1403 (D.D.C.), *aff'd*, 54 U.S.L.W. 5064 (U.S. 1986). The States may not be permitted to restrict, as Illinois sought to do in *MITE*, transactions in interstate commerce regulated by Federal statute — the purchase and sale of securities. That does not mean, however, that a State statute of the kind at issue here — regulating (as the States have traditionally and exclusively done) the voting power of shares of the State's corporations — is invalid simply because one of its effects may be to make the purchase of such shares less attractive as an *economic* proposition for a prospective acquirer. Whether the Commerce Clause is "honored" or "evaded" depends not on whether a given economic outcome is reached, but rather on whether the Federal Government and the States are acting within their respective spheres of constitutional authority.

Moreover, the logic of the Seventh Circuit's contrary reasoning points inexorably in one direction: Any aspect of State corporation law that may make it harder to take over voting control of a domestic corporation violates the Commerce Clause. While the Seventh Circuit "assume[d] without deciding that Indiana has a broad latitude in regulating [the internal affairs of its corporations], even when the consequence may be to make it harder to take over an Indiana corporation," Appendix at A27, its reasoning in fact has no stopping point. It reaches any aspect of State corporate law that may discourage a takeover; the Seventh Circuit articulated no logical distinction between such laws, and none exists. If a State may not "jigger with voting rights," there is no reason why it may "jigger" with schedules and voting methods for electing boards of directors; fiduciary standards applicable to takeover defenses; restrictions on freeze-out mergers that may injure minority shareholders; or

any other aspect of corporation law that may annoy a given tender offeror.

CONCLUSION

Since the Federal constitutional issues here are so substantial, this Court should note probable jurisdiction, set the case for plenary consideration, and reverse the judgment below.

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Respectfully submitted,

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